

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KELLY CHRISTOPHER JACOBS,

Defendant-Appellant.

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UNPUBLISHED

December 23, 2003

No. 242784

Oakland County Circuit Court

LC No. 2000-174167

Before: Schuette, P.J. and Murphy and Bandstra, JJ.

PER CURIAM.

Defendant appeals by right his conviction after a jury trial of felonious assault, MCL 750.82a, and aggravated assault, MCL 750.81. The trial court sentenced defendant to prison term of 7 1/2 to 15 years for the felonious assault, and one year to be served concurrently for the aggravated assault. We affirm.

**I. FACTS**

This case arises from defendant's involvement in the attack of three men attempting to evict a tenant. Steven Cromedy testified that on February 8, 2000, he, along with his brother and a court officer, were evicting a tenant from a residence that he owned. The three men were placing the tenant's property outside on the sidewalk. Cromedy testified that when they were just about finished clearing out the premises, defendant entered with another male.

The defendant asked, "what the [explicative] is going on?" Cromedy responded that the tenant, defendant's then-girlfriend, was getting evicted. At that point, six or seven more males entered the residence and defendant struck Cromedy in the face. Cromedy was attacked by several of the men and hit with bottles and a glass ashtray. Woodrow Philips, Cromedy's brother who was in the room when his brother was first attacked, also was attacked by several men. Cromedy later received medical treatment (several staples in his head) as a result of the injuries he incurred during the incident.

Roland Segal, the court officer, testified that he was at the residence assisting Cromedy in the eviction of the tenant. Segal testified that he was in another room when he heard a lot of noise coming from the front of the residence. Segal went to investigate the commotion and found Cromedy and Phillips down on the floor being attacked by several men. Segal began to

intervene by pulling a couple of the attackers off of Cromedy and Phillips when he himself was attacked. Segal identified defendant as the first person who attempted to attack hit him.

Segal testified that defendant came towards him swinging a two-by-four which he blocked by putting his arm up to deflect the blow. After he blocked defendant's swing of the two-by-four, two other men attacked him. One man tried to kick him in the groin and the other hit him in the face. Segal has no recollection of what happened after being hit in the face. He later regained consciousness at the hospital. At trial, the prosecutor introduced a photograph of an imprint from the two-by-four on defendant's stomach. Segal received twenty-seven stitches and has a four-inch scar on his forehead as a result of his injuries.

The jury found defendant guilty of felonious assault and aggravated assault. Defendant appeals as of right.

## II. OFFENSE VARIABLES 7 and 14

### A. Standard of Review

The sentencing court has discretion in determining the number of points to be scored provided that there is evidence on the record which adequately supports a particular score, *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002), and thus this Court reviews the scoring to determine whether the sentencing court properly exercised its discretion and whether the evidence adequately supported a particular score, *People v McLaughlin*, \_\_\_ Mich App \_\_\_, \_\_\_ NW2d \_\_\_ (#234433, rel'd 9/25/03) slip op p 18.

### B. Offense Variable 7

A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score. *People v Leversee*, 243 Mich App 337, 349; 622 NW2d 325 (2000). Scoring decisions for which there is any evidence in support will be upheld. *People v Elliot*, 215 Mich App 259, 260; 544 NW2d 748 (1996). Under MCL 777.37, the trial court must score OV 7 as fifty points if the court finds evidence of "terrorism," which MCL 777.37(1)(a) defines as "conduct designed to substantially increase the fear and anxiety a victim suffers during the offense." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002); MCL 777.37(1)(a).

In this case, defendant asserts the trial court incorrectly scored points under OV 7. In overruling defendant's objection to the scoring of OV 7 at sentencing, the trial court noted that the particular victim was trying to break up a fight when he was suddenly attacked by the defendant swinging a two-by-four. The aforementioned attack was elicited via the testimony of victim Roland Segal. There was no testimony or evidence to refute Segal's account of the attack. Nor was there any testimony or evidence suggesting that the attack did not occur.

Segal was hospitalized with an imprint of a two-by-four on his stomach, consistent with the object Segal testified that defendant attacked him with. Additionally, Segal received 27 stitches in a wound to his head as a result of being struck. The court regarded that attack as

terrorism and pointed to the victim's injuries and subsequent hospitalization to merit the score given.

This Court concludes that, based on the testimony and evidence presented at trial, the trial court did not err in scoring 50 points for terrorism under OV 7 in compliance with MCL 777.37.

### C. Offense Variable 14

A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score. *Leversee, supra*, at 349. Scoring decisions for which there is any evidence in support will be upheld. *Elliot, supra*, at 260. Under the statute governing the scoring of OV 14, Offender's Role, 10 points is to be scored where the offender was a leader in a multiple offender situation. MCL 777.44(1)(a).

It is for a sentencing judge to conclude from the facts of the case whether the defendant was a leader or an active participant in a multiple offender situation. *People v Whetro*, 152 Mich App 524, 528; 394 NW2d 3 (1986). In the present case, defendant asserts that the trial court abused its discretion in scoring OV 14. In reviewing the lower court's record, there was ample testimony and evidence to sustain the trial court's scoring of 10 points for OV 14. Cromedy testified that as he was conducting the eviction, defendant entered the apartment with another person stating, "What the [explicative] is going on?" and ". . . now what, nigger, now what?" Cromedy testified that it was defendant who delivered the first blow, after which the other men in the room followed suit and attacked the victims.

Segal testified that defendant was the first to come after him as well. Segal further testified that defendant was the one who appeared to be "always in the lead." When asked for his basis of the assertion that defendant was always in the lead, Segal testified that some of the people were hanging back behind defendant and did not act until he acted. Further, there was no evidence, testimony, or facts that suggested that another person could have been responsible for the conduct defendant was charged with.

This Court concludes that, based on the testimony and evidence presented at trial, the trial court did not err in scoring 10 points for OV 14 under MCL 777.44.

## III. INEFFECTIVE ASSISTANCE OF COUNSEL

### A. Standard of Review

Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge must first determine the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact are reviewed for clear error. *Id.* Questions of constitutional law are reviewed de novo. *Id.*

### B. Analysis

The benchmark case describing the standard for claims of actual ineffective assistance of counsel in Michigan is *People v Pickens*, 446 Mich 298, 318; 521 NW2d 797 (1994). In *Pickens*, the Michigan Supreme Court adopted the Supreme Court's test in *Strickland v Washington*, 466 US 668; 104 S Ct. 2052; 80 L Ed 2d 674 (1984). The *Strickland* test requires the greatest level of factual inquiry into the actual conduct of the defense and its effect on the

outcome of the trial. *LeBlanc, supra*, at 578. Under the *Strickland* test, the burden is on the defendant, to show with regards to counsel's performance;

"...that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment . . . [and] that the deficient performance prejudiced the defendant of a fair trial, a trial whose result is unreliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown of the adversary process that renders the result unreliable. *Strickland, supra*, at 687.

In applying this test, a court must indulge a strong presumption that counsel's conduct falls within the wide range of professional assistance. *Id.* at 689.

Defendant asserts that his counsel was ineffective for failing to object to the trial court's scoring 25 points under OV 13. In reviewing defendant's presentence report, it appears that the trial court correctly scored OV 13. Thus, defendant's argument is without merit.

Under the language of the statute governing OV 13 scoring, MCL 777.43, a defendant is to be assessed 25 points when the offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person. MCL 777.43(1)(b). The statute further instructs that, "all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." *Id.*

Defendant's presentence report discloses that defendant has satisfied the criteria to be assessed 25 points under the statute. Defendant was charged with assault with intent to rob, armed, MCL 750.89, on February 1, 2001<sup>1</sup>; another assault with intent to rob, armed, *Id.*, on May 17, 2000<sup>2</sup>; and assault with intent to do great bodily harm less than murder, MCL 750.84, and felonious assault<sup>3</sup>, MCL 750.82, on March 14, 2000. Thus, defendant had a total of four assaultive crimes to be considered in the scoring of OV 13.

Accordingly, because there was no basis for defense counsel to object at sentencing, counsel could not be ineffective for failing to object to the scoring of OV 13. The trial court correctly scored 25 points under OV 13 in compliance with MCL 777.43. Counsel is not required to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

#### IV. DEPARTURE FROM SENTENCING GUIDELINES

##### A. Standard of Review

In reviewing a departure from the guidelines range, the existence of a particular factor is a factual determination subject to review for clear error, the determination that the factor is

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<sup>1</sup> This case is awaiting trial.

<sup>2</sup> This case was dismissed.

<sup>3</sup> Defendant was convicted for this crime.

objective and verifiable is reviewed as a matter of law, the determination that the factors constituted substantial and compelling reasons for departure is reviewed for an abuse of discretion, and the amount of the departure is reviewed for an abuse of discretion. *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003); *People v Abramski*, 257 Mich App 71, 74; \_\_\_ NW2d \_\_\_ (2003).

## B. Analysis

MCL 769.34(3) provides that a trial court "may depart from the appropriate sentence range established under the sentencing guidelines ... if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure." If after reviewing the lower court record, this Court "finds the trial court did not have a substantial and compelling reason for departing from the appropriate sentence range, [we] shall remand the matter to the sentencing judge or another trial court judge for resentencing under this chapter." MCL 769.34(11).

Here the guideline range for defendant's sentence was 12 to 48 months. The trial court sentenced defendant to 7 ½ to 15 years. In doing so, the trial court stated:

The defendant has an OV score of 116 point when only 75 are needed to place him in level four so that's the highest OV level allowed in connection with this particular matter. In this category, his score is 41 points greater than the worst case scenario and most certainly, in my opinion, can be used as a reason to depart above the guidelines. The guidelines just didn't contemplate this bad a situation, as far as I'm concerned. I feel that is sufficient reason to deviate.

I heard the testimony. He precipitated an event that caused serious injury to an individual, causing him hospitalization and scarring, which I've already said several times. That takes it out of the usual felonious assault where somebody may threaten him with a gun or anything of that nature. He did serious damage to this individual and as such, based on the OV score in connection with this, I feel that excess of 48 months is not sufficient. Therefore, I sentence him to a minimum of seven and one-half years to a maximum of fifteen years in state prison with credit for 140 days.

Factors meriting departure must be objective and verifiable, must keenly attract the court's attention, and must be of considerable worth. *People v Babcock*, 469 Mich 247, 257-258; 666 NW2d 231 (2003). To be objective and verifiable, the factors must be actions or occurrences external to the mind and must be capable of being confirmed. *People v Abramski*, 257 Mich App 71, 74; \_\_\_ NW2d \_\_\_ (2003).

A departure from the guidelines range must render the sentence proportionate to the seriousness of the defendant's conduct and his criminal history. *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003). Three men were in the process of lawfully evicting a tenant when two of them were confronted by defendant and several others. Defendant struck one of the men and several of his friends follow suit. Cromedy testified that he was hit with an ashtray or a bottle. The other man in the room, Phillips, was also subsequently attacked by several men. The court officer, Segal, who was in another room, observed the attack and intervened by pulling

several of the attackers off of the men being beaten. Defendant then attacked Segal with a two-by-four, rendering Segal unconscious.

As a result of these attacks, Cromedy had to receive several staples in his head. Segal did not regain consciousness until he woke up in the hospital some time later. He too received stitches, 27 for a head wound. Segal was also hospitalized with an imprint on his stomach from a two-by-four.

In reviewing the record, this Court concludes that substantial and compelling reasons for departure were present under the facts of this case. Thus, the trial court did not abuse its discretion in departing from the sentencing guidelines.

Affirmed.

/s/ Bill Schuette

/s/ William B. Murphy

/s/ Richard A. Bandstra